

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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U.S. DISTRICT COURT  
N.D. OF ALABAMA

VELYN IRONES,

Plaintiff

vs.

THE BIRMINGHAM BOARD OF  
EDUCATION, et al.,

Defendants

CIVIL ACTION NO.

CV-97-AR-573-S

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ENTERED

JUN 3 1998

MEMORANDUM OPINION

Presently before the court is a motion for summary judgment filed by the defendants, the Birmingham Board of Education ("Board") and Willie Burkhalter ("Burkhalter"), in this sex discrimination case brought by the plaintiff, Velyn Irones ("Irones"). Irones asserts claims against the Board pursuant to Title VII, 42 U.S.C. § 2000e, et seq. and she asserts claims against Burkhalter in his individual capacity, pursuant to 42 U.S.C. § 1983. Because there are genuinely disputed material issues of fact, the court finds that summary judgment for the defendants is inappropriate.

I. FACTS

Irones began working for the Board as a senior clerk typist in 1980. Almost eleven years later the Board promoted her to the position of Senior Inventory Clerk. Later Irones served as the Acting Inventory Accountant for approximately four years. The

current dispute revolves around the selection process for the permanent Inventory Accountant position.

In February 1996, the Board posted a job vacancy notice for the Inventory Accountant position. The notice indicated that applicants should be able to type and should have at least ten years business office experience. Irones applied for the position and survived the first round of interviews, which were conducted by Burkhalter, who is a Personnel Coordinator for the Board. Burkhalter and two other male Board employees interviewed the remaining group of candidates, which consisted of both males and females. The interviewing committee unanimously recommended a male, Paul Mitchell ("Mitchell") for the position. The Board later accepted the recommendation and offered the position to Mitchell, who had inventory experience as well as retail sales and management experience.

## **II. SUMMARY JUDGMENT STANDARD**

Under F.R.Civ.P. 56(c), summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law."

**III. THE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE  
CASE OF DISCRIMINATION**

Irones can establish a prima facie case of discrimination if she can show: 1) that she is a member of a protected group, 2) that she was qualified for the position, 3) that she was rejected despite her qualifications, and 4) that Mitchell had lessor or equal qualifications.<sup>1</sup> See *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998) (citation omitted). The defendants contend that Irones cannot make out a prima facie case of discrimination because, *inter alia*, she has presented no evidence that she was "more or better qualified" than Mitchell.

The court finds it hard to believe that the defendants wasted three pages of paper making meritless arguments on this point. In order to establish her prima facie case, Irones merely needs to show that she was qualified for the job, not that she was "more or better" qualified. See *id.* There is no doubt she can meet this requirement. Not only had Irones held the position for approximately four years, See *Young v. General Foods Corp.*, 840 F.2d 825, 830 n.3 (11th Cir. 1988) (noting that "where a plaintiff has held a position for a significant period of time,

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<sup>1</sup> Title VII claims and employment discrimination claims asserted under § 1983 are both analyzed under the McDonnell Douglass paradigm. *Arrington v. Cobb County*, 139 F.3d 865, No. 96-9114, 1998 WL 197636, \* 9 n.16 (11th Cir. 1998).

qualification for that position sufficient to satisfy the test of a prima facie case can be inferred") (citation omitted), but defendant Burkhalter admitted in his deposition that Irones was qualified for the position. (Pl.'s Ex. 14, Burkhalter Dep. at 88.) Therefore Irones has established a prima facie case of discrimination.

**II. DEFENDANT'S LEGITIMATE NON-DISCRIMINATORY REASON FOR SELECTING MITCHELL**

Because Irones has established a prima facie case for discrimination the burden of production (not the burden of persuasion) shifts to the defendants to come forward with a legitimate non-discriminatory reason for recommending Mitchell. See *Trotter v. Board of Trustees of University of Alabama*, 91 F.3d 1449, 1454 - 55 (11th Cir. 1996). If the defendants can supply such a reason, the burden shifts back to Irones to produce admissible evidence from which a jury might find that the defendants' proffered reason is pretextual. See *id.* Defendants offer Mitchell's superior job qualifications as their legitimate non-discriminatory reason for selecting him rather than Irones. Specifically, the defendants assert that Mitchell's experience in sales, management and inventory made him more qualified for the position than Irones.

In an attempt to show pretext, Irones makes several arguments. First Irones contends that the defendants failed to show that, at the time of the interview, they were aware Mitchell met the minimum qualifications for the position. See *Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1062 (11th Cir. 1994) (holding that the employer cannot satisfy its burden of production by offering a justification based upon information which it did not know at the time of the challenged employment decision). Although the committee had a copy of Mitchell's resume during the interview, Burkhalter does not recall whether he or any committee member determined how many years of business office experience Mitchell had. (Pl.'s Ex. 14. Burkhalter Dep. at 27, 28, 29, 30, 31, 32.) In addition, Burkhalter is uncertain whether anyone ever verified Mitchell's employment or his reasons for leaving his past jobs. (Burkhalter Dep. at 30, 32.)

While such evidence does raise some concerns about the thoroughness of the defendants' hiring practices, it does not suggest discriminatory animus.<sup>2</sup> Assuming the veracity of Mitchell's resume, he clearly had the type of experience necessary for the position. From 1982 until 1990, Mitchell was a

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<sup>2</sup> Irones does not allege that defendants verified the resumes and backgrounds of female applicants, but failed to do so for Mitchell or other male applicants.

retail manager responsible for inventory, quality control, payroll, staffing and other duties. (Pl.'s Ex. 7, Mitchell Resume.) He was a buyer/sales associate from 1992 until 1994. *Id.* In that position, Mitchell was responsible for departmental management, purchasing, inventory and employee training, among other duties. *Id.* Thus, even though Mitchell did not have ten years of traditional "business office" experience, he obviously had worked for ten years in an environment where he gained the skills one acquires in an office, as well as more advanced skills. In addition, he had over ten years of actual inventory experience; Irones cannot genuinely dispute that such experience is appropriate for an inventory accountant position. When the interviewers met with Mitchell they had a copy of his resume which described his relevant experience. Therefore, the record does not support Irones's assertion that the Board's legitimate non-discriminatory reason for selecting Mitchell was contrived after instigation of this lawsuit.

#### **IV. PLAINTIFF'S EVIDENCE OF PRETEXT**

Irones next attempts to introduce direct evidence of pretext. Irones contends that a co-worker told her that Burkhalter said Irones was a good employee but that the Board needed a man for the position. (Pl.'s Ex. 15, Irones Aff.) However, this court cannot consider such evidence because the

statement by Irones constitutes hearsay to which no exception applies. See F.R.E. 801 - 805. Furthermore, it is unclear from the record whether the unidentified co-worker actually overheard Burkhalter make the alleged statement or the co-worker overheard someone else attribute the statement to Burkhalter. (See Pl.'s Ex. 15, Irones Aff.) Thus, the circumstances surrounding Burkhalter's alleged statement could involve numerous levels of hearsay, none of which Irones has attempted to show are admissible. As inadmissible hearsay, this court is unable to consider the statement as evidence of pretext.

Although Irones testified during her deposition that nothing untoward occurred during her interview, (Irones Dep. at 90.), she now points to a question Burkhalter asked during the interview as indirect evidence of pretext. Burkhalter asked Irones what she would do if she gave the "guys" an order and they refused to comply. (Pl.'s Ex. 14, Burkhalter Dep. at 52, 55.) Burkhalter admits that he asked this question because he was curious about Irones's management style, given that most of the employees in the inventory department are men. (Pl.'s Ex. 14, Burkhalter Dep. at 55.) Thus, Burkhalter admits he interjected gender related concerns into the interview process.

These concerns, alone, do not provide evidence from which a

jury could find pretext. However, the defendants have been unable to locate Burkhalter's interview notes. The missing notes along with his expressed gender concerns do prevent the court from granting summary judgment for defendants.

**V. IRONES IS ENTITLED TO AN INFERENCE THAT DEFENDANTS' LEGITIMATE NON-DISCRIMINATORY REASON FOR SELECTING MITCHELL WAS PRETEXTUAL**

Irones contends that she is entitled to a presumption of pre-text because the defendants have apparently lost the interview Analysis Form Burkhalter completed after the committee interviewed Irones.<sup>3</sup> (Pl.'s Ex. 16.) First, Irones points out that the defendants had a duty to preserve the documents in question, pursuant to Equal Employment Opportunity Commission ("EEOC") regulation 29 C.F.R. § 1602.14.<sup>4</sup> Next, Irones cites to

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<sup>3</sup> Also missing are all the evaluations of Irones as Acting Inventory Accountant. (Pl.'s Ex. 16.)

<sup>4</sup> The EEOC regulation provides, in pertinent part:

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.... Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

several cases which purportedly support her argument that lost or destroyed records create a presumption the documents would have bolstered her case. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir. 1987); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 - 88, 66 S. Ct. 1187, 1192 (1946).

Where a party is unable to produce documents which are relevant to a dispute, the court may infer that the contents of the missing or destroyed documents is unfavorable to the party responsible for production. *Marquis Theater Corp. v. Condado Mini Cinema*, 846 F.2d 86, 90 (1st Cir. 1998). The imposition of this adverse inference is justified for two reasons. First, there is an evidentiary rationale based upon

the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be....

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.

*Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (citations omitted).

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29 C.F.R. § 1602.14

However, there are limitations on the court's ability to draw such an adverse inference.

In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. "Mere negligence" in losing or destroying the records is not enough for an adverse inference, as "it does not sustain an inference of consciousness of a weak case."

*Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (citing *Vick v. Texas Employment Comm'n.*, 514 F.2d 734, 737 (5th Cir. 1975))<sup>5</sup> (other citations omitted). While the Eleventh Circuit has not explained what circumstances might constitute bad faith, the court, in *Bashir v. Amtrak*, did point out the circumstances upon which it relied when it refused to impose an adverse inference.

119 F.3d 929.

The plaintiff, Rashool Bashir ("Bashir") was the personal representative for his son, who was struck and killed by a train. Bashir sued two railroad companies contending, *inter alia*, that the excessive speed of the train proximately caused his son's death. Defendants sought summary judgment on the excessive speed

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<sup>5</sup> The Eleventh Circuit has adopted as precedent all Fifth Circuit Court of Appeals cases decided prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

claim arguing that the Federal Railroad Safety Act (FRSA)<sup>6</sup> preempted such claims. Applying United States Supreme Court precedent, the district court held that the FRSA preempted the claim, only if the train was traveling in excess of the federally imposed speed limit of eighty miles per hour. *Id.* at 930.

After reviewing the testimony of the train engineer and the assistant engineer, the district court found that the defendants had met their initial burden of establishing that there were no genuinely disputed facts regarding the speed of the train. *Id.* The court rejected Bashir's argument that summary judgment was inappropriate because the defendants' failure to preserve the train's automatic speed recording tape created an inference favorable to Bashir's case. *Id.* at 930 - 31. Bashir appealed and the Eleventh Circuit, citing to a lack of evidence regarding bad faith, upheld the district court:

[I]t is undisputed that neither [the engineer] nor [the assistant engineer] had control over the content or fate of the speed tape, or had any contact with anyone who did have control over the tape; that both of these witnesses knew that the speed of the train was routinely recorded and that the tape would thus show the speed of the train at the time of the accident; and thus that at the time these two witnesses reported 70 mph to the police officer ... they necessarily would have thought that the speed tape would also evidence the speed of the train at the time of the

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<sup>6</sup> Formerly, 45 U.S.C. § 421, et seq., now codified at 49 U.S.C. § 20101 et seq.

accident.... [In the face of such evidence, Bashir] adduced absolutely no evidence that the train was traveling at a speed other than 70 mph.

*Id.* at 932 (emphasis supplied). Finally, observed the Eleventh Circuit, neither the engineer or the assistant engineer "had any motive or opportunity to try to tamper with the tape ...." *Id.* Under these circumstances, concluded the court, there was "exceedingly strong evidence that the train was in fact going 70 mph." *Id.* (emphasis supplied). Thus, no reasonable jury could find that the train was traveling in excess of eighty miles per hour and therefore "an adverse inference [was] not warranted."

*Id.*

Unlike *Bashir*, an adverse inference is warranted in the present case because there is evidence of bad faith. First, the defendants in the present case had a duty to preserve the employment record at issue. 29 C.F.R. § 1602.14 The defendants in *Bashir* had no such duty. More importantly, unlike the defendants in *Bashir*, the defendants here did have a motive and an opportunity to tamper with the missing document. The document could have established discriminatory bias on the part of Burkhalter, thus the defendants had motive. In addition, they had an opportunity to tamper with the document which was under their supervision and control. Finally, unlike *Bashir*, Irones

introduced some evidence, in addition to the unexplained absence of the document, to support the adverse inference she champions. Burkhalter's admitted gender concerns, along with the inference created by the missing document could support a jury finding that Burkhalter selected Mitchell based upon impermissible motives. Here, unlike *Bashir*, the circumstances surrounding the absence of the document indicate bad faith. Accordingly, for purposes of summary judgment, this court must give Irones the benefit of the adverse inference. See *Stanton v. National Railroad Passenger Corp.*, 849 F. Supp. 1524, 1528 (M.D. Ala. 1994) (applying the adverse inference rule where there was a question of fact regarding the defendants' motivation for destroying a railroad tape and defendants could not explain the circumstances surrounding the destruction of the tape) (cited with approval in *Bashir*, 119 F.3d at 932 - 33)

Defendants counter by arguing that any adverse inference, to which Irones may be entitled, does not preclude summary judgment in their favor. Because two of the three original Interview Analysis forms support the committee's selection of Mitchell, defendants essentially argue that any discriminatory animus by Burkhalter did not affect the committee's ultimate selection of Mitchell. Further, the defendants contend that the committee

merely recommended Mitchell for the position. The personnel director, interim superintendent and the Birmingham School Board then accepted the committee's recommendation. Therefore, Irones cannot show that a discriminatory motive "more likely motivated" the School Board's ultimate decision.

The court agrees that Irones has little chance of proving that a discriminatory motive "more likely motivated" the Board. What defendants have conveniently forgotten, however, is that this court cannot grant summary judgment if there is evidence from which a jury might find that gender was "a motivating factor for any employment practice, even though other factors also motivated the practice." *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1441 - 1442 (11th Cir. 1997) (citing 42 U.S.C. §§ 2000e-2(m), 2000e-(5)(g)(2)(B)) (emphasis supplied). Even if the defendants can show that they would have made the same employment decision in the absence of the alleged bias, Irones may seek declaratory relief, injunctive relief and attorney's fees, if she can show that discrimination was "a motivating factor." *Canup*, 123 F.3d at 1442 (citing 42 U.S.C. § 2000e-(5)(g)(2)(B)) (emphasis supplied).<sup>7</sup>

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<sup>7</sup> The court notes that an award of relief under 42 U.S.C. § 2000e-(5)(g)(2)(B) is within the court's discretion.

The upshot of [Title VII's mixed motive provisions] is that once the plaintiff has presented evidence reasonably suggesting that her race, sex, religion, or national origin played a motivating role in her discharge, summary judgment will rarely (if ever) be appropriate; for even if the employer can eliminate all doubt at that point as to whether it would have taken the same action without considering the proscribed criterion, the plaintiff still might obtain limited relief.

*Venters v. City of Delphi*, 123 F.3d 956, 973 n.7 (7th Cir. 1997) (emphasis supplied). Finally, the record suggests that the superintendent and the School Board primarily based their approval of Mitchell on the committee's recommendation. Cf. *Holifield v. Reno*, 115 F.3d 1555, 1563 - 64 (11th Cir. 1997) ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.") Given that the recommendation may have been tainted by bias, summary judgment for the defendants is not appropriate.<sup>8</sup>

## VII. CONCLUSION

This court finds that there is evidence of bad faith

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<sup>8</sup> Irones also maintains, as evidence of pretext, that the defendants did not give Mitchell a typing test, even though typing skills were listed as a job requirement in the job vacancy announcement. However, Irones supports this assertion by citing to her affidavit where she states "I upon information and belief I do not believe Paul Mitchell was required to take a typing test ...." (Pl.'s Ex. 15, Irones Aff.) (emphasis supplied). Such evidence does not create a genuine issue of material fact.

surrounding the absence of Burkhalter's interview notes. Therefore this court applies an adverse inference that the document would have supported Irones's contention that gender bias was "a motivating" factor in the selection of Mitchell for the position of Inventory Accountant. Accordingly, summary judgment for defendants is inappropriate.<sup>9</sup>

A separate appropriate order will be entered.

DONE this 3<sup>rd</sup> day of June, 1998.

  
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WILLIAM M. ACKER, JR.  
UNITED STATES DISTRICT JUDGE

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<sup>9</sup> Asserting claims of qualified immunity, Burkhalter contends that summary judgment is appropriate inasmuch as Irones brings claims against him in his individual capacity. Because Irones has a clearly established right to remain free from unlawful gender discrimination, the qualified immunity defense is without merit.